FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

June 21, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-470
Petitioner,	:	A.C. No. 12-02010-182283-01
	:	
	:	Docket No. LAKE 2009-471
	:	A.C. No. 12-02010-182283-02
v.	:	
	:	Docket No. LAKE 2009-612
	:	A.C. No. 12-02010-191237-02
	:	
BLACK BEAUTY COAL COMPANY,	:	Mine ID: 12-02010
Respondent.	:	Mine: Air Quality #1 Mine

DECISION

Appearances: Awilda Marquez, Pam Mucklow, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Arthur Wolfson, Dana Svendson, Jackson Kelly, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

These cases are before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Black Beauty Coal Company at its Air Quality #1 mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The three dockets captioned above , which are the subject of this decision, were heard along with three other dockets, LAKE 2009-565, 569, and 570, and share a common transcript and exhibits. Docket Nos. LAKE 2009-565, 569, and 570 are addressed in two other decisions. With the exception of the seven citations and orders discussed below, the parties have agreed to settle all citations and orders in the captioned dockets. The settlement terms are set forth below. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana commencing on February 15, 2011.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Black Beauty Coal Company, ("Black Beauty") operates the Air Quality #1 mine (the "mine"), a bituminous, underground coal mine, near Vincennes, Indiana. The mine uses a continuous miner and utilizes the room and pillar method. (Tr. 15). The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Black Beauty is the operator of the mine, that the mine's operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. Jt. Ex. 1; (Tr. 587-588). Black Beauty Coal, like a number of other mines in the Indiana-Illinois area, is owned by Peabody Energy. The mine is a large operator.

A. Common Facts and Law

In addition to the penalty criteria and jurisdictional matters, there are a number of facts that are common to the citations and orders discussed below. The parties have agreed that each of them is "free to argue that evidence admitted in the context of a particular Citation or Order is relevant to the court's determination of other Citations and Orders. Further, if the Court accepts the party's argument, the Court may consider that evidence in reaching her decision concerning those other Citations and Orders." Jt. Ex. 1, Stip. 11. I have used the evidence in total in reviewing the various violations.

At the time the subject citations and orders were issued the mine had been on the (d)(2) series for quite some time. Each inspector who testified indicated that this mine has had a number of serious, ongoing problems. The primary ongoing problem has been accumulations, including coal, float coal dust, and oil. The mine has also had chronic issues with keeping the accumulations out of the belt areas, and keeping the ventilation in place to prevent exposure to dust. This mine has a greater than normal number of permissibility violations. All inspectors credibly testified that the mine was on notice, both from past violations and meetings with management, that it should be paying attention to the violations related to accumulations, ventilation plans, roof control plans, and dust exposure.

The mine is on a 103(I) five day spot inspection due to the large quantities of methane liberated. The mine argues that the methane is primarily emitted at the sealed areas. Nevertheless, the mine is considered a gassy mine. During the time frame that many of these citations and orders were issued, from March 30, 2009 until June 29, 2009, the mine received 271 citations and 11 orders. Sec'y Ex. 60. The mine history shows that, in the less than one year period prior to when the subject violations were issued, the mine received 102 citations and orders for accumulations violations, Sec'y Ex. 63, and 47 violations for permissibility violations, Sec'y Ex. 64. Further, a number of the subject violations were issued in February 2009. The history also shows 234 violations of accumulation standards in the prior two year period. Sec'y

Ex. 69. Finally, the history shows that, from March 2007 to March 2009, there were a large number of permissibility, accumulations, ventilation and roof violations, all or which are very serious matters. Sec'y Ex.71. During testimony, each of the inspectors who issued the subject violations found that the violations were obvious and were something that should have been discovered prior to the inspection on either a preshift examination, an onshift examination, or during the regular course of mining.

The majority of the orders and citations discussed below have been designated as significant and substantial. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

> [i]n order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

The difficulty with finding a violation S&S normally comes with the third element of the Mathies formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc.,

6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Further, the question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In addition to being designated S&S, many of the citations and orders were designated as an unwarrantable failure or attributable to high negligence. The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id*. at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I rely on the cited case law when considering the citations and orders discussed below, particularly with respect to the issues of S&S and unwarrantable failure. The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration, or lack thereof, and consistencies or inconsistencies, in each witness' testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied on his or her demeanor. Any failure to provide detail on each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433,436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

B. Docket No. LAKE 2009-470

This docket contains three violations, all of which remain at issue, with a total proposed penalty of $190,787.00.

1. *Order No. 8414994*

On February 26, 2009, Inspector Danny Franklin issued Order No.8414994 to Black Beauty for a violation of section 75.400 of the Secretary's regulations. The citation alleges that:

> Combustible material is allowed to accumulate around the 1 West "B" tail roller. The accumulations are in the form of loose and fine cola measuring approximately 2 by 5 feet by 19 inches width. The tail roller was touching and running in coal 17 inches wide by 2 feet tall and 4 feet in length. When inspected there was a distinctive odor indicating there was material getting hot. With past history, the operator has engaged in aggravated conduct constituting more than ordinary negligence by continuing to violate this standard. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector found that a fatal injury was highly likely to occur, that the violation was significant and substantial, that six persons would be affected, and that the violation was the result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of $70,000.00.

a. **The Violation**

Inspector Danny Franklin started in coal mining in 1973 and has worked for MSHA for the past four years. While conducting an inspection of the Air Quality mine on February 26, 2009, he issued a citation for a violation of section 75.400 which prohibits the accumulation of combustible material. Franklin was accompanied by Randy Hammond, a representative of the mine. After arriving in the 3 main north area he traveled on foot toward the west 1b belt area. (Tr. 79). After turning the corner to the three main north and walking an additional 60 feet, Franklin noticed the distinct odor of burning coal. He questioned a belt examiner about the odor and was told that the belt examiner had noticed and investigated the odor about 30 minutes prior to Franklin's arrival, but found nothing of concern. (Tr. 81-82). Franklin followed the smell and immediately found the problem at the tail roller. He observed the roller turning in the coal which had compacted in the guard around the roller. (Tr. 85).

The accumulation around the tail roller was approximately 2 feet deep and covered an area 5 feet in length by 19 inches wide. (Tr. 86). This is an active working area where there was combustible material in the form of coal and an ignition source created by the friction of the turning belt and roller. The coal had compacted near the guard and was spilling off the belt onto the bottom and along the sides of the belt for about 5 feet in length. The accumulation was 2 feet in depth and packed alongside the belt. Franklin observed that no one was posted at the tail, but several people were working about 100 feet inby the area, and mining was taking place in 3

locations near the cited area. Franklin described the material as coal that was black in color. He described the smell as obviously that of coal, however, no smoke was present and the CO monitor did not sound its alarm.

Randy Hammond a production foreman at the mine, accompanied Franklin on his inspection. Hammond is currently in the safety department and has been working as a compliance supervisor for about one year. He has 26 years experience in mining and holds a BS degree in mining engineering. (Tr. 148-149). Hammond testified that he observed the tail piece of the west 1 belt and he could smell hot rubber. When Franklin walked on the off-side of the belt, Hammond observed coal spilling out of the transfer point where skirt rubber had come loose. Hammond remembered that the area was wet, the belt was fire resistant and, while friction would have created a smell, it would not have been the smell of burning coal. Hammond believed that the smell was burning rubber and there was no smoke or flame present. (Tr. 159-161).

James Villain, an employee at the mine, was a belt shoveler at the time the order was issued. He has worked in the mining industry for approximately 17 years. (Tr. 171). Villain testified that, on February 26, 2009, he was working the day shift, during which he cleaned the tail of the B belt around 9:15 a.m. Villain does not recall much spillage and believes that the belt skirt was in place. The area was wet because he had hosed off the spillage. At some point while he was traveling to the head of the one west B belts, the belts went down. Villain promptly turned around and went back to the tail area where he met Franklin and Hammond. There he observed the spillage and the damaged skirt rubber. He explained that two bolts had passed through the rubber, caused it to wear out, and had pulled the rubber back. (Tr. 173-175). According to Villain, the spill had not been in place for very long because he had just cleared the area about ten minutes before Franklin arrived.

There is no factual dispute that there was an accumulation of coal packed in the guard and the rollers were turning in it. The parties agree that some coal had spilled on the ground but disagree as to the amount. The testimony of the mine witnesses is that there was some spillage, but it was permissible spillage as opposed to an accumulation of coal. I need not address the issue of spillage on the ground since it is undisputed that there were accumulations packed in the guard on the conveyor and the rollers were turning in that accumulation. For the above reasons, I find that a violation of the cited standard did exist.

b. **Significant and Substantial Violation**

I have found that, as alleged by the Secretary, there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violation, the danger of fire and explosion given that presence of combustible material and an ignition source. The fact that there are safety measures in place along the belt does not take away from the fact that an incident is likely to occur in a gassy mine with many accumulation violations and a

history of ignitions. Third, the hazards associated with this condition such as being trapped or required to fight a fire, exposure to smoke from a belt fire, and the hazards associated with an explosion, will result in an injury. Fourth, that injury will be serious or even fatal.

Franklin explained that a fire hazard definitely existed due to the combustible material surrounding the roller, which was turning and creating friction, thereby providing an ignition source and a fuel source. (Tr. 87). The coal was dark and dry. (Tr. 92). No cleaning was going on at the time that would have prevented the accumulation from continuing to exist. Franklin explained that a fire grows rapidly under the conditions he observed. (Tr.98). In addition, he opined that there is little room for error in this area because there is only one air course and, in the event of a fire, there would be no alternative for a smoke free escape. (Tr. 101).

There were three miners working in the immediate area and Franklin observed three additional miners working nearby. At least two of the individuals in the area were trainees that were accompanying the belt mechanic. I find that at least six miners were immediately exposed, that it reasonably likely that an injury will occur as a result of the accumulation turning in the rollers and, further, that the injury will be fatal. Franklin testified that he was concerned about smoke inhalation and burns that would be suffered while trying to put out a fire. According to Franklin, the end result would be smoke inhalation and burns that would be fatal.

The S&S evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc*., 6 FMSHRC at 1574. While Villain testified that the accumulation was probably only present for ten minutes, his testimony conflicts with Franklin's, who was told by a miner in the area that he investigated the burning odor 30 minutes prior to the arrival of Franklin. The condition was serious and the rubber and coal were already beginning to put off the "burning" odor. If left unabated, a fire was certain to start. . In addition, Franklin observed that the miners in the area were not paying attention and either had not looked, or had dismissed as irrelevant, the source of the burning smell. Based on such, Franklin concluded that a fire would start and flare out of control before the miners even noticed. I credit the testimony of Franklin and find that the condition had existed for some time. If this condition had been allowed to persist, it is reasonably likely that it would have led to a fire or explosion. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985). The particular facts surrounding this violation lead to a finding of significant and substantial.

The mine argues that the violation is not significant and substantial because the condition existed for only a short time and the fire suppression system that was in place would control any fire that might start. Again, I credit the inspector's testimony regarding the length of time the condition existed. Further, I reject the argument that the fire suppression system would negate the finding of S&S.

The mine operator argues that all of the other protections required by the Mine Act and its

regulations detract from the possibility of an injury producing event. The Courts and the Commission have found to the contrary. The Commission, relying on *Buck Creek Coal, Inc*., 52 F.3d 133, 136 (7th cir. 1995), has rejected arguments that after-the-fact safety systems, such as carbon monoxide detectors, fire suppression systems, and fire retardant belts, reduce the likelihood of serious injury. In *Buck Creek* the mine operator argued that carbon monoxide detectors, a fire-retardant belt, a fire suppression system, a fire brigade team, a rescue team, fire fighting equipment and ventilation all undermined the likelihood of a serious injury that would result from a coal accumulation violation. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the existence of other safety measures to deal with a fire does not mean fires are not a serious safety hazard since the precautions are in place because of the "significant dangers associated with coal mine fires." *Id.*

I conclude that the preponderance of the evidence establishes that coal accumulations were reasonably likely to result in injury causing events, and that the injuries would be serious or fatal. I rely primarily on the testimony of Inspector Franklin in reaching this conclusion. I find that the Secretary has satisfied the four Mathies criteria and established the violation as S&S.

c. **Unwarrantable Failure**

The burning odor that Franklin and Hammond described was distinctive and should have given the miners good reason to search for the cause. However, when the miners did not discover the source of the odor, they simply returned to their duties. Those miners confirmed that the burning odor had been in the air for a minimum of 30 minutes prior to the inspector's arrival. Franklin testified that the miners were desensitized to the smell and a fire would get started before they even noticed. Franklin believes that the work force is a reflection of the management, particularly the attitude toward safety, and it was obvious to him that this smell was ignored. (Tr. 102).

Hammond explained that the skirt rubber looked as if it had been torn, thereby creating a chute to send coal down from the belt to the ground. According to Hammond, a tear can happen "in an instant" and result in spillage, but not necessarily a lot of spillage. In his opinion, the spill had been ongoing for only a short time, perhaps a minute or less, based upon the quantity he observed spilling and the amount on the ground. Hammond testified that the material on the ground was wet, had been sprayed at the transfer point, and was newly on the ground. Franklin agrees that this kind of spill can occur at any moment but explained that he based his unwarrantable designation primarily on the lack of concern about the coal turning in the rollers resulting in a burning odor and this mine's history of accumulations. While the parties agree that the spill could have occurred quickly, the operator did not explain why the odor of burning coal had been evident for more than 30 minutes prior to the arrival of Hammond and Franklin. It is fair to assume that coal had been turning in the rollers for some time in order for the burning odor to permeate the air. While the spill on the ground may have been recent, it is clear that the coal turning in the belt was not. The coal on the belt should have been seen and noted by Villain.

Villain did not recall any spill, at least on the ground, and he testified that the ground was wet because he had sprayed off the spillage. Hammond agrees that the spillage was wet because the coal had traveled through the water sprays. Neither witness explained the coal turning in the rollers emitting the burning odor and, therefore, I find that Franklin presented a scenario that was the most likely and well grounded in fact. While he cannot be certain how long the condition existed, it is fair to say that it existed far longer than it should have. (Tr. 90).

This mine has had a number of prior violations for accumulations, along with prior warnings for excessive accumulations on the belt line. Franklin sited 3 other nearby accumulations on the same day. (Tr. 89). The mine has not taken effective measures to correct the continued accumulation violations and, according to Franklin, it is possible that it has made no effort to correct the these persistent conditions. (Tr. 102). Many accumulation violations have been issued at the mine since 2007 and, in Franklin's view, the mine was not doing enough. It is clear to me that the mine has failed to train its miners to call or seek help when they cannot discover the source of a burning smell. The actions of the miners lead Franklin to assume that little had been done to address accumulations on the belt at this mine. Moreover, the mine did not refute the allegations made by Franklin. In light of the foregoing, I agree with Franklin that the negligence was high, that the operator demonstrated indifference or lack of reasonable care and that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. I assess the proposed $70,000 penalty.

2. *Order No. 8415253*

On February 27, 2009, the day following the numerous accumulations sited by Franklin, Inspector Glenn Fishback issued Order No.8415253 to Black Beauty for a violation of section 75.400 of the Secretary's regulations. The citation alleges that:

> Obvious an[d] extensive accumulations of combustible material in the form of loose coal, coal fines and float coal dust (Dry and black in color) have been allowed to accumulate on the 4 West A energized conveyor belt Drive and Take-up located at crosscut number 2 to crosscut 3 on the return side of the 4 West roadway. The combustible material measured approximately 38 feet in length by 20 foot in width and 8 inches to 2 ½ feet in depth directly behind the take-up. From the take-up to the drive rollers the accumulations measured approximately 2 inches to 16 inches in depth by 3 feet in width and 39 feet in length of loose coal, coal fines and float coal dust. These accumulations were observed on all of the frame work and structure of the drive and take-up[.] [T]he belt was observed smoking and running in accumulations of float coal dust measuring approximately 5 inches in depth and 12 inches in width and also rubbing the drive frame at this same

> location. The belt was also observed rubbing the frame work in the take-up and the hanger which holds the cross under up, float coal dust was present on all of the water lines and electrical cables and starter boxes from crosscut #1 to #3. With past history, the operator has shown more than ordinary negligence by allowing the belt to run under this known condition until the arrival of MSHA to the area. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector found that a permanently disabling injury was highly likely to occur, that the violation was significant and substantial, that ten persons would be affected, and that the violation was the result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of $70,000.00.

a. **The Violation**

Inspector Glenn Fishback has been with MSHA for three years and has 20 years of mining experience. He worked at the Air Quality mine for a time during his career. On February 27, 2009 , while inspecting the conveyor, Fishback found an accumulation of combustible material and issued an order for a violation of 30 C.F.R. § 75.400 which prohibits the accumulation of combustible material.

Prior to going underground Fishback reviewed the mine books and noticed a problem in the 4 west A area. (Tr. 427). When he arrived in the subject area, he observed accumulations of coal on the running, energized belt. He observed accumulations of loose coal, coal dust, and fines that were black, dry, dusty, and existed for a distance of 38 feet long, and 20 feet wide. There were various lengths and depths of accumulations along the belt, with one accumulation being 38 feet long and 2 feet in depth as measured by tape. (Tr. 429). Fishback observed the accumulations running in the belt, and could smell burning and see smoke on the belt at the tandem rollers. (Tr. 432). He found the belt out of alignment and rubbing in the framework. He asked the operator to shut it down immediately. The belt, which was rubbing the framework in the tandem rollers and in the take up, had cut ¾ of an inch into the metal framework. (Tr. 430-431). In addition to running on the frame, the belt was rubbing in the accumulated material.

Fishback could not understand why it took an hour for the mine to lock out the belt after he shut it down and issued the citation. (Tr. 438). He testified that, when asked, the shift foreman refused to remove a guard so that Fishback could measure under the belt, until management arrived and told Fishback that "this is the one he's been waiting for." (Tr. 439). Fishback was unclear as to the meaning of the foreman's statement. Once the belt was locked out, Fishback took his measurements and completed the citation.

The mine argues that there was not a violation as described by Fishback, that there were not dangerous accumulations and the area was well rock dusted. In support of the proposition, the mine called Kim Orr, an hourly employee who accompanied Fishback on his inspection. Orr saw the belt rubbing on the frame but she did not recall it cutting into the structure and she did not remember any smoke. She agreed that some accumulations of pressings, rock dust, and some float dust were seen between the drive and the take-up. (Tr. 516-517). She explained that it was not a hazard "right there." (Tr. 518). Orr agreed that there was a little float dust, but disagreed with Fishback that it was all float dust. Instead, she testified that what she observed was rock dust. She couldn't estimate how much rock dust, but she thinks it was "quite a bit." (Tr. 519).

Jamie Haantz, the operation superintendent at the mine, oversees the entire plant and mine and has done so since July 2010. At the time this order was issued he was the underground superintendent, in charge of the entire underground mine. (Tr. 531-532). Haantz holds a number of certifications, including a BA in mining engineering and several MAs, including safety management and engineering. (Tr. 533) On February 27, 2009, he learned from Randy Hammond that the 4 west belt had been shut down due to accumulations. He testified that he "[w]ent ahead and got ahold of everybody[,] we treat the D order like an accident. We start bringing the mine managers, the assistant mine manager, we all-we all go to that location." (Tr. 534).[1] When he arrived, the belt was down. Haantz did not see the belt rubbing, but saw rock dust and some float dust on the water line. He touched the dust and saw that it was white and had moisture in it. At the sump he saw some coal pressings, but no accumulation. (Tr. 537-538). He did not observe the extent of accumulations that Fishback described in other areas (i.e., around the take-up and drive roller areas) and, as far as he could see, everything was rock dusted.

Randy Hammond traveled with Haantz and took photographs. BB Ex. R-S. Haantz testified as to the locations in photographs A through X. *Id.* He identified the sump area, power boxes coming into crosscut 2, the drive at crosscut 2, drive and take-up area, waterlines, a rib, waters supply, south side of the take-up unit, and guard on the drive. He testified that there was very little float dust or other accumulations in any of the pictures and, rather, there was rock dust in virtually every picture. Setting aside for a moment the fact that the photos were taken without the knowledge of Fishback or MSHA, they remain unreliable because they contained no date to identify when they were taken. Further, no other reliable evidence was offered to support that the photos did indeed depict the areas and conditions cited by Fishback. Instead Hammond testified that he took the photos and that they represented the conditions he observed. However, Fishback testified that he observed no one taking photos and, further, he was unable to testify that the photos represented what he observed during the investigation. In addition, the photos do not square with the testimony of Orr, the miner who accompanied the inspector. I do not credit Hammond's testimony and, without any further evidence, I give very little weight to the photographs.

---

[1]I note that during the hearing of these cases there were many unwarrantable violations but this is the only instance where the mine alleged or presented evidence that a (d) order is treated like an accident.

While the testimony concerning the accumulations is disputed, i.e. there are three different descriptions of the area, I credit the description provided by Fishback and I find that the Secretary has shown that accumulations, which were black and dry, were present on the belt and the surrounding areas. In light of the foregoing, I find a violation.

b. **Significant and Substantial Violation**

I have found that there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violations, the danger of a belt fire caused by the belt rubbing on the frame and igniting the accumulations of coal and float coal dust. Third, there is a high likelihood of an accident occurring in this gassy mine that has many accumulation violations, and a belt rubbing on a metal frame. A fire on the belt caused by the friction of the belt in the coal accumulation will result in an injury. Fourth, any injury sustained will be serious or even fatal.

Fishback based his conclusions on his experience. He credibly testified that the belt was creating friction and providing an ignition source as it turned in coal and against the side of the metal framework. In his view, the hazard presented by the accumulation at the belt drive was the creation of a mine fire and, when combined with the float coal dust and the gassy nature of the mine, the possibility of an explosion. (Tr. 430). Fishback could smell burning rubber and noticed that the belt had folded over on it's edge and was rubbing in the tandem. (Tr. 433-436). He explained that fire and smoke would travel quickly to the face where the men were working. According to Fishback, a minimum of ten persons would be exposed. (Tr. 435). Fishback opined that any injury would be permanently disabling or even fatal, given that a fire will result in burns and smoke inhalation. (Tr. 437). If an explosion were to occur, the result would be worse. Given the presence of an ignition source, along with the size of the accumulation he observed, a mine fire was reasonably likely to occur given the cited conditions. (Tr. 430-431).

The operator's argument regarding the S&S designation is primarily factual. Orr testified that she did not believe that the accumulation was as extensive as Fishback described. She did, however, concede the existence of accumulations and the fact that the belt was rubbing on the frame. Haantz also testified that he believed that the accumulations were not as extensive as Fishback described and that they consisted primarily of rock dust and not coal dust as asserted by Fishback. Fishback described the accumulations as black in color and agreed that there was some rock dust under the float dust he cited. Haantz indicated that the accumulations in certain areas were white or gray with rock dust, but not black. I credit the observations of Fishback in this regard. If this condition had been allowed to persist, as it obviously had up to this time, it is reasonably likely that it would have led to a fire or explosion. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

The Commission has addressed the issue of accumulations and conveyor belts a number of times. In *Amax Coal Co.*, 19 FMSHRC 846 (May 1997), the Commission upheld an ALJ's

finding that a belt running on packed coal was a potential ignition source for extensive accumulations of loose, dry coal and float coal dust along a belt line, and that the condition presented a reasonable likelihood of an injury causing event. In addition, in *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), the Commission held that accumulation violations may properly be designated as S&S where frictional contact between belt rollers and the accumulations, or between the belt and frame, results in a potential ignition source for the accumulations. The Commission in *Mid-Continent* found that it was immaterial that there was no identifiable hot spot in the accumulations because continued normal mining operations must be taken into account when evaluating the circumstances. In the present case, if the violative condition had been allowed to persist, it would have reasonably led to smoke, fire and, potentially, an explosion. In fact, Fishback testified that he could smell smoke as he entered the area.

The Respondent argues that all of the other protections required by the Mine Act and its regulations, which it alleges were properly in place at the time of the order, reduced the possibility of an injury producing event, thereby rendering the violation non-S&S. Specifically, the Respondent points out that the CO detector did not activate and that the belt is made of fire resistant material. (Tr. 469-471). The Courts and the Commission have addressed the issue of other required safety standards that come into play in discussing whether a violation is S&S. In *Buck Creek Coal*, 52 F.3d 133, 136 (7th cir. 1995), the mine operator argued that carbon monoxide detectors, a fire-retardant belt, a fire suppression system, a fire brigade team, a rescue team, fire fighting equipment and ventilation all undermined the likelihood of a serious injury that would result from a coal accumulation violation. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the fact that there were other safety measures to deal with a fire does not mean that fires are not a serious safety hazard and, rather, the precautions are in place because of the "significant dangers associated with coal mine fires." While extra precautions may help to reduce some risks, they do not render accumulations violations non-S&S.

I conclude that the preponderance of the evidence establishes that it was reasonably likely that the coal accumulations, combined with the other conditions cited, would result in injury causing events, and that the injuries would be serious or fatal. I rely primarily on the testimony of Inspector Fishback in reaching this conclusion. I find that the Secretary has satisfied the four Mathies criteria and established the violation as S&S.

c. **Unwarrantable Failure**

This order for accumulations on the belt was issued only one day after the order discussed above that was issued by Inspector Franklin for accumulations on the belt. Fishback testified that the accumulations were "obvious and extensive. I don't know how the examiner didn't trip over some of it." (Tr. 443). Fishback could smell the rubber burning when he arrived. While there is some dispute as to how long the accumulation had existed, it was in place at least for the hours

between 9:00 a.m., when the onshift examination was conducted, and 5:00 p.m., the time of the citation. Fishback believes that, given the extent of the accumulations, it had to exist for a longer period of time. However, the examiner testified that he did not see this extensive accumulation when he conducted his examination at 9:00 a.m. Therefore, it is unlikely that the extensive accumulation existed for more than the eight hours.

In addition to the obvious and extensive nature of the accumulation, Fishback relied on the mine history of accumulations in determining that the violation was unwarrantable. He has issued previous orders for accumulations, including some specifically for accumulations on the belt. He has spoken to the safety director, mine manager and section foreman, as well as others at the mine, about the accumulation problems at this mine. (Tr. 449-450). He talked about the number of accumulations and the lack of improvement with the accumulation issue. After being questioned on cross examination, Fishback candidly said that he has been trying to avoid a major catastrophe at this mine, given the continued problem of accumulations.

The Respondent denies that it has a problem with accumulations and believes that it was not put on notice of the need to improve. However, this mine has demonstrated a serious lack of reasonable care. The mine's primary argument is that the accumulations were not as extensive and serious as Fishback described. I have already credited the testimony of Fishback in that regard and, therefore, I agree with Fishback that the negligence was high and the result of the operator's unwarrantable failure to comply with the mandatory standard. I assess a $70,000 penalty.

3. *Order No. 8415254*

On April 27, 2009, Inspector Glenn Fishback issued Order No. 8415254 to Black Beauty for a violation of Section 75.360(b) of the Secretary's regulations. The citation alleges that:

> An inadequate onshift examination was conducted for the 7:30 AM to 3:30 PM examination on 2/27/2009 for the second shift production. Order number 8415253 was issued under this 104(d)(2) Order. Obvious and extensive accumulations of combustible material in the form of loose coal, coal fines and float coal dust (Dry and black in color) was observed by MSHA with the conveyor belt running in this material on this date. The examination record for the 7:30 AM to 3:30 PM examination of this affected area showed no hazards listed. This violation is an unwarrantable failure to comply with a mandatory standard. Management will have a meeting with all mine examiners to terminate this 104(d)(2) Order.

The inspector found that a permanently disabling injury was highly likely to occur, that the

violation was significant and substantial, that ten persons would be affected, and that the violation was the result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of $50,787.00. The citation was amended at hearing to reflect a violation of section 75.362(b).

a. **The Violation**

As a result of the accumulation violation discussed above, Inspector Glen Fishback issued this citation for failure to note the accumulation violation during the onshift examination of the belt. The cited standard, as modified to at hearing, requires that "[d]uring each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulage way where a belt conveyor is operated." 30 C.F.R. § 75.362(b).

Fishback testified that he looked at the examination books both before he went underground and after the citation was issued and could find no indication that the accumulation he cited on the belt was noted by the mine examiner. He determined that nothing was listed about either the belt or the accumulation. (Tr. 455-456). He testified that there was no entry in pre-shift exam book on February 27, 2009 about the 4 west A belt. BB Ex. R-V; (Tr. 442). In Fishback's view, the accumulations were obvious and extensive and he couldn't see how the examiner would have been able to avoid tripping over them. Fishback further testified that the violation was S&S because the accumulation of coal and float dust would lead to a fire and explosion. In addition, he marked the negligence as high for the same reasons he described in the accumulation violation.

Buskirk, the mine employee who conducted the inspection of the belts on the day of the alleged violations, testified that, had he seen the amount of accumulation described by Fishback, he would have noted it in the report and shut down the belt. On the day of the alleged violation, Buskirk noted several conditions in his report, including that rock dust was needed in the belt area of 4-5. The report says that the rock dusting was done. BB Ex. R-V; (Tr. 495). His report also indicates that, at crosscut seven through nine, Buskirk observed that the drive and takeup needed to be cleaned and dusted. (Tr. 495). He saw no combustible material so he did not record it as a hazard, but he did record it as a condition. (Tr. 496). He listed other hazards that day that were corrected. (Tr. 497). He has reviewed the citations issued by Fishback and is certain that the cited condition was not present when he made his onshift examination at 8:45 a.m. (Tr. 493, 498). Buskirk explained that, had he seen such a condition, he would have listed it as a hazard and shut the belt down.

Contrary to Fishback's belief, on Feb 27, 2009, Buskirk was not conducting an onshift exam of the belts at 1:51 p.m. and, instead, was conducting a preshift of the power center and drive boxes at that time. There is a drive on the belt near where Fishback cited the condition, but it is between the roadway and the belt. Further there is a date board near the drive where he would have initialed. He conducted his onshift of the belt on his way into the mine at around

9:00 a.m. and would have examined the box on his return at approximately 2:00 p.m. At the time he was examining the electrical installation he would not have gone along the four west A belt or to the drive. (Tr. 501). Given that Buskirk was only in the cited area during his onshift exam at 9:00 a.m, and not at 2:00 p.m as believed by Fishback, there was ample time between the examination and the issuance of the citation, i.e., nearly eight hours, for coal and float dust to accumulate to the degree cited by Fishback. Without further evidence, the Secretary has not met her burden of demonstrating that the onshift examination was inadequate. Therefore, the citation is vacated.

C. Docket No. LAKE 2009-471

This docket contains twenty-two violations with a total proposed penalty of $172,506.00. The parties have agreed to settle all but the three violations addressed below. The terms of the settlement are addressed near the end of the decision.

1. *Citation No. 6681954*

On February 17, 2009, Inspector Marsha Price issued citation number 6681954 for a violation of section 75.220(a)(1). The citation alleges the following:

> The operators approved roof control plan was not being complied with on the number 2, (MMU 002-0, 1 Left 2 Right / 4 Main North active working section. The number 5 entry right that creates an intersection with number 5 entry right is not permanently bolted with the at least two rows of bolts or one row of temporary support before work or travel is permitted in the intersection. The number 45, Joy CM 14 miner is cutting in the number 5 entry right. Work was stopped and the area was secured until the number 5 entry could be bolted.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence.

The cited standard requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. § 75.220(a)(1). The Black Beauty plan requires that two rows of roof bolts must be placed for the first cut that creates an intersection. The Secretary has proposed a civil penalty in the amount of $5,080.00.

a. **The Violation**

Marsha Price, has been an inspector with MSHA for 2 years and has 17 years mining experience. She is a health specialist but also an authorized representative of the Secretary. (Tr. 329-330). On February 17, 2009, Price conducted an inspection at the mine and was accompanied by Dave Wininger. (Tr. 331). She observed the alleged violation of the roof control plan after checking the miner to see that all ventilation controls were in place. As she walked to the other side of the miner to watch the cutting process, she noticed that, while the plan calls for two rows of support, there was only one. (Tr. 333). Price said that the she did not notice whether there were two rows of bolts when the 5 entry began, but she did notice it on the right side as the cut on the right concluded. According to Price, the mine's roof control plan requires that first cuts that create an intersection must have either temporary support or two rows of bolts installed. Sec'y Ex. 34 p. 7 item 6; (Tr. 334). The entry that had just been cut was 18 to 20 feet wide and the one row of bolts in place did not qualify as temporary support. (Tr. 336). Price testified that she observed cracks in the roof and ribs that created a hazard. In the event of a roof fall, a fatal crushing injury would be sustained. Miners, including foremen and supervisors, often travel in the area to move equipment and examine the area. According to Price, it was a busy area. (Tr. 337). Price testified that the first cut off of the five straight entry, to the right, created an intersection in that area. At the time she initially observed the area they had not made the turn to the right. (Tr. 364). Price explained that the entry was bolted but, as the cut went further and the intersection was created, there was only one row of bolts installed instead of the required two rows. (Tr. 366).

John Rennie offered testimony, albeit somewhat confusing, that he did not agree with Price that there was a violation. Aside from creating a drawing of what he believed were the two row of bolts at issue, Rennie did not explain the reason for his opinion that there was no violation. (Tr. 376). However, Chad Barras, the Midwest safety director for Peabody, did attempt to explain his view of the roof control plan and why it was not applicable in this instance. Barras is responsible for 12 mines, including Air Quality. He has a BA in mining engineering and has worked in various mines and held various responsibilities over the course of his career. He has negotiated roof control plans at other mines and has worked on roof plans at Air Quality. (Tr. 408-412). Barras does not believe that the cited condition is a violation of the plan. He testified that Item 6 of the roof control plan, cited by Price, requires that the first cut creating the intersection must be permanently bolted. According to Barras, the cut that created the intersection was the cut from the 4 to 5 entry. He opined that the area cited by Price was not the first cut that created an intersection and, hence, there was no violation.

The requirement for each underground coal mine to develop a roof control plan is a fundamental directive of the Mine Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976). *See* 30 U.S.C. § 862(a) (setting forth general requirements for plans "to protect persons from falls of the roof or ribs."). The intent of the provision was "to afford comprehensive protection against roof collapse - the 'leading cause of injuries and death in underground coal mines.'" *UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir.

1989) (citations to legislative history omitted). The Commission has acknowledged the high degree of danger posed by roof control plan violations. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (Aug. 1994).

In this instance both parties seemingly did their utmost to make the issue confusing and incomprehensible. I do not find Barras to be a credible witness and I give little weight to Rennie's responses to leading questions. I find Price to be the most credible and straight forward. She agreed with the operator that the #5 entry was bolted when she arrived but she left that entry before mining continued straight and then to the right. It is unclear whether Price believes that the first opening into the intersection was the straight cut or the cut to the right. The Secretary's brief indicates that "5 entry straight" was the subject cut. Sec'y Br. 20. However, after carefully reading the transcript, I cannot understand where Price believes the two rows of bolts should have been placed, nor can I find any indication about MSHA's position as to what "the first cut in openings that create an intersection" means. The Secretary has the burden to prove all elements of the violation. I find that the Secretary has failed to prove every element of the violation and, as a result, the citation must be vacated.

2. *Citation No. 6681953*

On February 17, 2009, Inspector Marsha Price issued citation number 6681953 for an alleged violation of section 75.208. The citation alleges that "no visible warning or physical barrier is installed to impede travel beyond the permanent support in Entry number 5 of the number 2 unit, (MMU 002-0), 1 left 2 right/4 main north inby crosscut 39 of the active miner unit." She designated the violation as significant and substantial with moderate negligence and a penalty of $3,689 has been proposed.

a. **The Violation**

Marsha Price issued this citation in the same location and at the same time as the roof control citation discussed immediately above. She observed that there were no flags or barriers to keep persons from proceeding under the unsupported top. (Tr. 344). The cited area of the five entry was 18-20 feet wide, 35-40 feet deep, and was referred to as the #5 straight. The area had not been roof bolted after the cuts were taken and, as a result, it was required to be barricaded so that no miner would unknowingly walk under the unsupported roof. Unsupported roof is, by its nature, unstable and a hazard to those walking under or even nearby. (Tr. 346). As Price explained, a barricade is important because a miner "wouldn't know that it wasn't supported, because there wasn't a flag in there and at the same time you're watching your feet where you're walking a lot and not paying attention a lot of times whenever you're helping move equipment, so you wouldn't be-you wouldn't notice an unsupported top." (Tr. 345). As a result of her observation, Price cited a violation of 30 C.F.R. § 75.208 which requires that "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily

visible warning, or a physical barrier shall be installed to impede travel beyond permanent support." Miners are trained to look for the barrier to indicate unsupported roof thereby directing their route of travel. No installation of roof support was observed and she saw no barricade or flag to impede travel beyond the last permanent support. (Tr. 344).

The respondent argues that a visible warning device had been in place but had been unknowingly removed. John Rennie is a mine examiner, lead man, and fill-in section foreman who has held a number of positions in the mine. Rennie testified that, when he entered the area, he believes there was a red reflective baton acting as a warning device hanging from the ceiling. In his opinion, the baton was knocked down and got loaded out without the knowledge of those working in the area. The respondent agrees that there was no warning or barrier at the time Price issued the citation, and Price agrees that, given the position of the miner operator, the operator may not have seen that the barrier/warning device was missing. Based on such, Price ascribed moderate negligence to the violation. Given the undisputed testimony that there was no warning or barrier in an area of unsupported roof, I find that a violation occurred as alleged.

b. **Significant and Substantial**

I have found that there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violations, the danger of a miner walking under unsupported roof. Third, the hazards described, that of walking under unbarricaded or unmarked, unsupported roof, would result in an injury. Finally, the injury would be fatal.

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Price testified that, while the baton was not in view at all times, it was certainly not in place for a period of time. Black Beauty agrees that it was not in place but argues that it had only been missing for a short, but undetermined, length of time. Rennie explained that, from his location he could not always see the area where the flag should have been placed. However, he opined that the baton may have been dragged off the roof and loaded with the coal, thereby explaining its absence. (Tr. 385). Price testified that she did not see the flag on the ground or anywhere in the vicinity. She could not say if it was in place earlier since the miner had just begun the cut when she left the area. I give greater weight to Price's recollection of the events and find that the baton or flag was not in place at any time. I do not find Rennie's testimony to be credible given that most of his responses were made primarily to very leading questions. I find that, had Price not brought the matter to the attention of the mine, it would have remained uncorrected for some time.

Price believes that there was a reasonable likelihood that, given the weight of the unbolted roof, it would fall at any time. Price observed cracks in the roof and ribs. (Tr. 359). Anyone traveling in the area would be struck by falling material and suffer serious, and

potentially fatal, crushing injuries. (Tr. 346). The failure to provide a flag created the hazard for miners who would unknowingly walk under unsupported roof and be crushed by falling rock and coal. While the mine examiner, foreman, workers, and persons moving cable, would all have been in the area and exposed to the unsupported roof, it is likely that only one miner at a time would be exposed. Price explained that cars back up to the miner in that intersection and it is a constant working area. (Tr. 357). Given that the roof was newly cut, a roof fall was likely. Such falls are known to cause crushing injuries, including broken bones, severe internal injuries and often fatal injuries. (Tr. 345). A person working in the area or walking through the area would not realize that the roof had not yet been supported without some warning or barricade to alert them and keep them out. (Tr 345). Based upon the foregoing, all of the circumstances surrounding this violation lead to a finding that it was S&S.

Price testified that she believed the negligence to be moderate at the time she issued the citation because, even though miner operators are trained to look for flags or barricades, this miner operator told her that a flag had been in place in earlier. Since issuing the citation, she found that the mine had been cited for an identical violation five times in the 18 months prior to the time she issued the subject violation. (Tr. 347). I agree with Price that the negligence was moderate. However, this violation is especially serious given that the required act, while routine, can result in deadly consequences when not performed. In light of the foregoing, I access a penalty of $10,000.00.

3. *Citation No. 8414992*

On February 25, 2009, Inspector Danny Franklin issued a citation for a guarding violation on a belt. The citation alleges the following:

> The guards protecting the miners from the hazards of the two moving take-up rollers and two drive rollers for the 3 West "B" drive are not extended a distance sufficient to protect persons from reaching over or tripping and falling between the belt and the pulleys. An area over the guards measuring approximately 20' by 13' exposing miners to the hazards of these massive rollers."

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence. A penalty of $3,689 has been proposed.

a. **The Violation**

Franklin cited the Respondent for an alleged violation of 30 C.F.R. § 75.1722(b) which requires that "[g]uards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a

distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley." Franklin testified that, while in the 3 West B drive area, he observed that the guards were not installed to extend a sufficient distance over the take-up rollers and the drive rollers such that they would prohibit reaching around and becoming entangled. The belt was running when he arrived in the area and he immediately noticed that the guards were not sufficient over both sets of rollers. In his view, the take up and drive rollers require more guarding due to their destructive nature. In his experience, there have been many injuries and fatalities as result of getting caught in one of these moving parts.

The drive rollers require regular clean-up, rock dusting, and examination, during which miners walk within inches of the moving rollers. This guard extended from the ground, up 4 feet, so that the rollers were level or above the top of the guards and were approximately 16-18 inches from the walkway. There was no means to protect the miners from tripping and falling into the either set of rollers. Franklin explained that the guards were insufficient because they were not high enough to prevent accidental contact. The walkway was packed down but contained areas of uneven ground that built up 10-14 inches in some areas. Given the difficulty of walking the path, and the fact that the rollers were higher than the guards, persons would not be prevented from reaching behind the guard and becoming caught between the belt and the pulley.

Franklin's concern was with reaching around the guard while the belt was in operation. He agreed that this guard could be made to work if it were installed differently. Hammond, testified on behalf of Air Quality that he accompanied Franklin during the inspection. Hammond viewed the area, including the take up and drive rollers, which were near one another but still in two different locations. In the first area, the drive rollers were on the outby side of the drive and he observed that the guard was parallel to the drive frame and, in his view, there was not a 16 by 20 inch opening which could be accessed. Additionally, there was a cross-under nearby that would be used by miners, keeping travel five feet away from location cited. Hammond further testified that contact with drive rollers is not likely to occur. He couldn't reach the drive rollers and during normal mining activity and in his view, someone could only touch it if they intentionally sought to do so. Regarding the take-up pulleys, he testified that they are on the side of the belt that is not traveled, i.e. the back side. He recalled that Franklin demonstrated the hazard by reaching over the guard, however, it is Hammond's opinion that the demonstration did not mimic normal activities since no one would have a reason to reach over the guard. Hammond saw no tripping hazards in the area.

The mine operator argues that these guards were installed in an effort to abate a number of guarding citations issued by MSHA inspector Johnny Moore. Brandon Flath testified that he has been the belt supervisor at the mine since 2007. In February, 2008, he had a conversation with inspector Johnny Moore, who had written a number of guarding violations requiring more rigid frames to replace the ones held together with wire. Flath made a plan and, after four or five months, completed the change of the guards on all of the belts. Flath testified that at some point Moore told him that all of the guards looked good. This guards in this area were completed in

March 2008, and no citations had been issued from 2008 until February 2009.

I am not persuaded by Flath that this particular guard or area was approved by any person with MSHA. I am also not persuaded by Hammond that the take-ups and the drive-pulleys would not be inadvertently contacted by those working in the area. Instead, I agree with Franklin and credit his testimony describing the condition. I find that the guarding did not adequately protect persons from harm and, accordingly, I find a violation.

b. **Significant and Substantial**

I have found that there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger of being caught in the turning rollers either by tripping and falling while on the walkway, or during maintenance and clean-up tasks along the belt. Once a miner comes into contact with a moving part on the belt, there is little to no chance of escape from being pulled into the belt. Such an occurrence will result in being crushed in the rollers and seriously, or even fatally, injured. Franklin explained that the miners work alone in the area and, therefore, even if a miner somehow manages to free himself from the belt, it is an impossible distance to travel for aid or to the surface. Franklin explained that a miner's arm is no match for the power of the drive rollers. Given the nature of the walkway and its uneven bottom, it is even more likely that an injury will occur. I credit Franklin's testimony and his understanding of the hazards. I find that the violation is S&S. Based upon the foregoing analysis, and considering all of the penalty criteria, including the gravity and negligence, I assess the $3,689.00 penalty proposed by the Secretary.

D. Docket No. LAKE 2009-612

This docket contains eighteen violations with a total proposed penalty of $106,988.00. The parties have resolved all but the one violation discussed below.

1. *Citation No. 8416307*

On May 26, 2009, Inspector Anthony DiLorenzo issued Citation No. 8416307 to Black Beauty for a violation of section 75.362(b). At hearing, the cited standard was modified to section 75.362(a)(1). The citation alleges that:

> Inadequate on-shift examinations have been performed on MMU 004-044. The following conditions were observed; The secondary escapeway lifeline was 2 crosscuts outby the section loading point; The escapeway maps were not being kept in a current, up to date condition in that the maps were marked to crosscut #89 when in

> actuality . . . [they] were at crosscut #105. The life line has existed since the morning of 5/22/2009 and the escapeway maps have not been marked up for several weeks based on the normal mining times.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, and that the violation was the result of high negligence. The Secretary has proposed a civil penalty in the amount of $45,708.00

The cited standard, as modified at hearing, requires the following:

> At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

30 C.F.R. § 75.362(a)(1). The Secretary must demonstrate first that the either someone was assigned to work during the shift or the MMU equipment is being installed or removed during that shift. Next, she must show that a hazardous condition existed that should have been observed, recorded and eliminated by the onshift examiner.

a. **The Violation**

Inspector DiLorenzo testified that, while conducting an inspection of the Air Quality mine on May 26, 2009, he observed conditions at MMU044 that lead him to believe that an inadequate onshift examination had been conducted. First, the lifeline was not extended to the working face and, second, the escapeway map was several weeks out of date. According to DiLorenzo, a hazardous condition exists if there is no updated escapeway map and the lifeline does not go directly to the working section. (Tr 1038-1039). DiLorenzo explained that the hazard he observed is that, in the event of a fire or explosion, heavy dust and smoke would be created and miners could not safely exit the mine from the face since the lifeline was not extended to that area. According to DiLorenzo, the miners "might not get the two crosscuts outby the working section to find the lifeline." (Tr. 1040). He notes that a miner can become disoriented quickly, have a difficult time traversing the 100 feet to the lifeline, panic, and fail to escape. The lack of a lifeline in the secondary escapeway could cause the miners to turn around and look for the primary escapeway. (Tr. 1041-1043). This lack of a lifeline is compounded by the fact that the escapeway map indicated that the mine was cut to crosscut 89 instead of crosscut 105, i.e., where the miners were working. If a miner attempting an escape grabs the map to help find his way, the fact that it is out of date adds to total confusion.

Based upon the observations of DiLorenzo, it may be reasonably inferred that the missing lifeline and faulty map existed at the time of the on-shift examination. DiLorenzo viewed the on-shift examination reports for MMU004. There were no entries to show that the lifeline was not extended to the working area and that the escapeway map had not been updated. The mine records demonstrate that the last advanced belt move for that unit was 4 days prior, which indicated to DiLorenzo that the lifeline had not been moved up for at least 4 days, i.e., 12 shifts. Sec'y Ex. 42; (Tr. 1048).

Air Quality does not dispute that the lifeline was missing for two crosscuts or that the escape map was not updated. They argue instead that neither of these conditions created a hazard and, therefore, did not need to be noted by the on-shift examiner. The operator's proof of this contention is found in the testimony of Mr. Hammond:

> Q. Is the escapeway map noted in the condition or practice an item that would be covered on an on-shift examination?
> A. No
> Q. Why not?
> A. It's not

(Tr. 1084).

Given the obvious nature of the violation herein, I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard herein, would have recognized that this hazard needed to be recorded in the examination book. *Utah Power& Light Co.* 12 FMSHRC 965,968 (May 1990) *aff'd* 951 F.2d 292 (10th Cir. 1991). Accordingly, I find Respondent's argument to be without merit. I find that a violation did exist.

b. **Significant and Substantial**

Based upon the case law discussed above, I find that this violation is not significant and substantial. I base this finding primarily upon the fact that the evidence presented goes to the S&S nature of the hazard created by the lack of a lifeline and the lack of a map, and not by an inadequate onshift examination. Different proof is required for an S&S finding of an inadequate onshift examination violation.

While I have found that there is a violation of the mandatory safety standard as alleged by the Secretary, and I can infer that not conducting an adequate on-shift examination creates a discrete safety hazard, the third element of the Mathies formula is not shown here. The third element is often the most difficult to prove, and this case is no exception. The fact that the on-shift examiner failed to mention the lifeline and map in the report does not make it reasonably likely lead to a serious injury. According to DiLorenzo, the danger associated with being unable to quickly and safely escape the mine in the event of smoke and fire is connected to the violation

of the missing lifeline. I note that much of DiLorenzo's testimony was in response to leading questions and he did not fully explain why the failure to note the hazard of the missing lifeline during an on-shift examination would result in an injury.

While I find that the absence of the lifeline is a serious problem, I cannot find that omitting mention of the lifelines from the on-shift report is, in and of itself, a S&S violation. Hammond, who testified on behalf of Black Beauty, focused, as DiLorenzo had, on the fact that the lifeline was missing for 100 feet, and not on the actual violation of identifying and recording the hazard in the on-shift book. In any event, the Secretary has not provided substantial evidence to support a finding of S&S in this matter.

c. **Negligence**

DiLorenzo designated this violation as high negligence. He relied on the fact that the condition existed for 12 shifts, i.e., since the time of the belt move. Again, DiLorenzo focused on the length of time the lifeline and map went unchanged, but in this instance, the fact that it went unchanged substantiates that it was not noted on any on-shift examination for an extended period of time. The Commission has often discussed the importance of preshift and on-shift examinations and that the failure to conduct adequate inspections, as evidenced by the violations found, can be the result of high negligence. *See Quinland*, 10 FMSHRC 705, 708-09 (June 1988) (obvious nature of lack of proper roof support), *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010-11 (Dec. 1987) (finding of unwarrantable failure where preshift examinations had been conducted but the roof control violations were not reported), *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (violations not reported following preshift examinations).

The mine operator asserts that it was not highly negligent because the condition had only existed for one shift prior to the citation. Hammond testified that failing to extend the lifeline and update the map was an oversight and the mine was not highly negligent. He explained that the belt was moved on May 22, 2009, as DiLorenzo described, but the move was followed by a holiday weekend. When the crew arrived on the evening of the 25th for the midnight shift on the 26th, there was no production. Therefore, the first production in this area was the shift on which DiLorenzo issued the violation and, likewise, the first shift on which any person was assigned to work in the area.

While the lifelines should have been extended at the time of the belt move, there is little evidence to show that the negligence in not doing so was high, and even less evidence to support that not noting it during an on-shift examination constitutes high negligence. In this case, the lifeline and map seemingly should have been discovered during what would have been the onshift examination that would have taken place had it not been a holiday weekend. Outside of the disputed timing, the Secretary has presented no other evidence of high negligence. As a result I find the negligence to be moderate. After consideration of all of the penalty criteria, I

assess a $10,000.00 penalty.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(I).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation and, except where noted, I accept the designations as set forth in each citation. I assess the following penalties:

<u>Docket Lake 2009-470:</u>	
Order No. 8414994	$ 70,000.00
Order No. 8415253	$ 70,000.00
Order No. 8415254	Vacated
<u>Docket Lake 2009-471:</u>	
Citation No.6681954	Vacated
Citation No 6681953	$ 10,000.00
Citation No.8414992	$ 3,689.00
<u>Docket Lake 2009-612:</u>	
Citation No.8416307	$ 10,000.00

Total: $ 163,689.00

The parties have settled the remaining citations and orders contained in these dockets. The settlement terms are as follows:

Citation/Order No.	Originally Proposed Penalty	Settlement Amount	Modifications
LAKE 2009-471			
8415129	$15,570.00	$946.00	Reduction in gravity to Non-S&S. Reduction in negligence to Moderate.
8415230	$7,578.00	$2,282.00	Reduction in negligence to Moderate.
8414977	$10,437.00	$2,106.00	Reduction in gravity to Non-S&S.
8415232	$11,306.00	$687.00	Reduction in gravity to Non-S&S. Reduction in negligence to Moderate.
8415235	$7,578.00	$2,282.00	Reduction in negligence to Moderate.
6681955	$7,578.00	$3,405.00	Reduction in gravity to Permanently Disabling.
8415237	$3,689.00	$1,111.00	Reduction in negligence to Moderate.
8415247	$7,578.00	$1,530.00	Reduction in gravity to Non-S&S.
8415250	$14,373.00	$1,304.00	Reduction in gravity to Lost Workdays or Restricted Duty. Reduction in negligence to Moderate.
8415260	$7,578.00	$2,282.00	Reduction in negligence to Moderate.
8415255	$8,209.00	$6,567.00	
8415259	$7,578.00	$2,282.00	Reduction in negligence to Moderate.
8415262	$7,578.00	$2,282.00	Reduction in negligence to Moderate.
8415513	$4,689.00	$1,203.00	Reduction in gravity to 1 Person Affected.
8415267	$7,578.00	$7,578.00	
8415271	$7,578.00	$2,282.00	Reduction in negligence to Moderate.
8415268	$4,689.00	$1,412.00	Reduction in negligence to Moderate.

8415221	$7,578.00	$1,412.00	Reduction in negligence to Moderate.
8415263	$11,306.00	$9,045.00	
Docket Total	$160,048.00	$51,998.00	
LAKE 2009-612			
8415789	$5,961.00	$362.00	Reduction in gravity to Non-S&S. Reduction in negligence to Moderate.
8415790	$1,111.00	$550.00	Reduction in negligence to Moderate.
8415791	$687.00	$207.00	Reduction in negligence to Moderate.
8416303	$2,473.00	$1,000.00	Reduction in gravity to 2 Persons Affected.
8415388	$12,248.00	$3,698.00	Reduction in gravity to 2 Persons Affected. Reduction in negligence to Moderate.
8416306	$2,901.00	$2,300.00	
8416401	$2,901.00	$873.00	Reduction in negligence to Moderate.
8416403	$873.00	$873.00	
8416404	$873.00	$873.00	
8416314	$873.00	$285.00	Reduction in gravity to 3 Persons Affected.
8416315	$873.00	$285.00	Reduction in gravity to 3 Persons Affected.
8416406	$4,689.00	$2,106.00	Reduction in gravity to Permanently Disabling.
8416316	$2,282.00	$2,282.00	
8416318	$1,657.00	$1,657.00	
8416319	$946.00	$285.00	Reduction in gravity to Lost Workdays or Restricted Duty.
8415398	$12,248.00	$3,689.00	Reduction in negligence to Moderate.
8416312	$7,578.00	$6,062.00	
Docket Total	$61,174.00	$27,387.00	
Overall Total	$221,222.00	$79,385.00	

I have considered the representations submitted by the parties and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(I) of the Act. The motion to approve settlement is **GRANTED**.

III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess a total penalty of $243,074.00 for the heard and settled citations and orders. Black Beauty Coal Company is hereby **ORDERED TO PAY** the Secretary of Labor the sum of $243,074.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (First Class U.S. Mail)

Awilda Marquez, Pamela Mucklow, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202

Arthur Wolfson, Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Ave., Pittsburgh, PA 15222